STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

DIANE K. SHOLBERG, as personal representative of the ESTATE OF TERRI A. SHOLBERG,

Plaintiff/Appellee,

v

ROBERT and MARILYN TRUMAN,

Defendants/Appellants,

and

DANIEL TRUMAN,

Defendant.

MSC Docket No. 146725

Companion Case MSC Docket No. 146721
Docket No. 307308
Circuit Court No. 11-2711-NI

146725
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of 6

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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Introduction

In scheduling this matter for oral argument, this Court directed the parties to file a supplemental brief focusing on the singular issue: "whether, and under what circumstances, a property owner who is not in possession of the property and does not participate in the conduct creating an alleged nuisance may be liable for the alleged nuisance." Defendants Robert & Marilyn Truman (hereinafter "Defendants" or "the Trumans") observe that the circumstances where a property owner may be liable for such a nuisance are extremely limited. The instant matter plainly does not involve one of the exceptions to the general rule that a property owner is not liable for a nuisance created by a person in possession and control of the property. Instead, the instant matter results because of an alleged nuisance arising solely out of Defendant Daniel Truman's exclusive possession, control, and use of the property. Accordingly, Defendants acknowledge that this Court may see fit to clarify both the general rule and the potential applicability of the limited exceptions to the general rule. However, as part of its clarification of the rule, this Court should also rule that the trial court correctly concluded that Defendants were entitled to summary disposition as to the nuisance cause of action. Consequently, Defendants respectfully request that this Honorable Court both clarify nuisance law and reverse the Michigan Court of Appeals opinion that reversed the trial court's dismissal of Plaintiff's nuisance cause of action.

Statement of Facts

Plaintiff's decedent, Terri A. Sholberg ("Plaintiff") died in an automobile accident on July 13, 2010 at approximately 5 a.m. when her vehicle struck a horse (See First Amended Complaint). Defendant Daniel Truman—who is not an appellant—has lived at 5151

Stutsmanville Road ("the property") for nearly his entire life (Deposition of Daniel Truman, Appendix A, 7). In contrast, at all material times, the Trumans have resided at 630 Cetes Road, in Harbor Springs, Michigan (Deposition of Robert Truman, Appendix B, 8).

In fact, the Trumans are only in this lawsuit because of their generous financial assistance to Defendant Daniel Truman in his time of need. Defendant Robert and Daniel Truman's mother sold the property to Daniel Truman and his ex-wife, Linda (Daniel Truman dep, 59). When Daniel and Linda Truman divorced in December 1989, the divorce decree required Daniel Truman to pay off his wife's equity interest in the property (*Id.* at 10). In order to have the cash to do so, Daniel Truman borrowed money from his brother, Robert Truman (*Id.*). But this financial assistance did not divest Defendant Daniel Truman of the exclusive possession and control of the property, which remained uninterrupted through the date of the incident.

Because of the financial assistance that the Trumans provided Defendant Daniel Truman, Linda Truman signed a deed to the property to Robert and Marilyn Truman (*Id.* at 59). Defendant Daniel Truman believed there was paperwork to memorialize this agreement (*Id.* at 11). Additionally, he understood that the property would be in his brother Robert's name until the debt was paid (*Id.* at 12). Under the agreement, Defendant Daniel Truman was to pay $300 a month towards the purchase of the land (*Id.* at 17). He was able make these payments for a couple of years (*Id.*).

Due to a lack of work, however, he eventually stopped making regular payments and only made occasional payments (Daniel Truman dep, 17) Defendant Daniel Truman did keep an itemized list of work that he has done for the Trumans over the years, which he considered to be worth full repayment on the property (*Id*[1]. at 17.) Defendant Daniel Truman had repaid

[1] This list of work was included as exhibits 2 and 3 to the Daniel Truman deposition transcript.

approximately $6,000 in cash (and apparently other consideration) towards the $15,000 that was lent (Robert Truman dep, 46).

Robert Truman expected Defendant Daniel Truman to repay him the $15,000, and had a land contract drawn up (Robert Truman dep, 50). However, he never obtained Defendant Daniel Truman's signature (*Id.* at 50). Robert Truman never made any improvements or changes to the property (*Id.*) Nor did he have any say over whom Defendant Daniel Truman invited to the property or the activities conducted on the property (*Id.*). Defendant Daniel Truman paid the property taxes (Daniel Truman dep, 78).

Defendant Daniel Truman never reported to the Trumans about what was happening on the premises, much less what animals that he was keeping (*Id.* at 20). Defendant Daniel Truman testified that the Trumans never controlled the property or were responsible for animals on the property (*Id.* at 20-21). Indeed, Defendant Daniel Truman deemed himself to own the property by virtue of his payments and other work performed.

Moreover, Daniel Truman and the Trumans were estranged; the Trumans have had little contact with Defendant Daniel Truman and the property in the past decade; prior to the accident, it had been eight or nine years since Robert Truman was last on the property (Robert Truman dep, 30). The Trumans' residence is seven miles away from the property, and Robert testified that he had only driven by the property twice in the past eight or nine years (*Id.* at 35). Defendant Daniel Truman's recollection was that it had been five or six years before the incident (Daniel Truman dep, 20). Additionally, Robert Truman has spent no time with his brother over the past ten years (Robert Truman dep at 45). Robert Truman did not get information or reports about Defendant Daniel Truman or the property (*Id.* at 51).

Defendant Daniel Truman owned the horse that was involved in the accident (Id. at 13-14). He traded fourteen feeder pigs to an acquaintance in exchange for the horse just ten days before the incident (*Id.* at 14). But he had "known" the horse for four years prior to the purchase, describing the horse as well-trained and a tame, "gentle giant" (*Id.* at 15-16). As a new horse acquisition, the horse was temporarily boarded in a corral on the property (*Id.*). Defendant Daniel Truman did not observe anything usual about the horse, such as it trying to escape, acting up, or becoming skittish (*Id.*)

A number of Daniel Truman's neighbors were deposed in this action. Their testimony reveals that there is simply no basis to impute knowledge regarding the "eloping" animals to the Trumans. For example, Defendant Daniel Truman's nearest neighbors are William and Ann Brecheisen. William Brecheisen testified that he never spoke with the Trumans about any issues with Defendant Daniel Truman's animals (See William Brecheisen dep, 17). Ann Brecheisen similarly testified that her only conversations with the Trumans regarding the Stutsmanville property was after the incident. (Ann Brecheisen dep, 11). So she never spoke to the Trumans *before* the incident.

Janice Hartman had called Defendant Daniel Truman or his neighbor, Mr. Perrault, a few times about the animals (Janice Hartman dep, 13). Similarly, she made a few complaints to 9-1-1 about animals (*Id.* at 15). However, she does not state that she ever called the Trumans.

Becky Sue Major testified that she only knows the Trumans by name, and could not pick them out of a crowd (Becky Sue Majordep, 20). She never made any reports about the management or operation of the Stutsmanville property to the Trumans. (*Id.* at 22). Becky's brother Jim Major testified that he had not seen any loose animals around the Stutsmanville property in over 9 years (James Major dep, 9). He never made any official reports about animals

being loose (*Id.* at 8). The only animals he ever observed were fowl and perhaps a dog (*Id.*). Jim and Becky's father, Al Major, testified that he knew the Trumans well, but had not spoken with them about any animals on the Stutsmanville property (Alfred Major dep, 9). He only made reports to Defendant Daniel Truman and to the authorities regarding animals on the Stutsmanville property (*Id.* at 8-10). So none of the Majors ever reported an issue to the Trumans.

Another neighbor, Edward Jelinek, did not even know Robert or Marilyn Truman (Edward Jelinek dep, 12). Mr. Jelinek also does not know James Major, Becky Sue Major, Janice Hartman, or Mike Ruggles, the other residents who apparently made formal complaints about animals loose at the Stutsmanville property (*Id.* at 13). He testified that he observed animals on Defendant Daniel Truman's premises "one or two times." (*Id.* at 8).

Stephen Jaquith lives three to four miles away from the property. He testified that he could not think of any instances of loose animals in the past five years (Stephen Jaquith dep, 9). As he thought the property was owned by Defendant Daniel Truman and did not know the Trumans, he would not have had reason to contact the Trumans (*Id.* at 9-10). Neighbor Richard Cobb testified that he observed animals near the Stutsmanville property on only one occasion in the past 20 years (Richard Cobb dep, 7-8). He did not testify about ever calling the Trumans to report an animal elopement issue. In sum, not a single neighbor testified that they ever contacted the Trumans to report an animal elopement issue.

Jack Balchik, has served as the animal control officer for Emmet County since 1983, is not familiar with the Trumans, and certainly never attempted to contact them regarding any complaint about animals leaving the property (Deposition of Jack Balchik, 63-64). Instead, he

testified that the person who possesses, controls or cares for the animals would be responsible for them (*Id*).

Marilyn Truman was also deposed in this matter. (Marilyn Truman dep, Appendix C). Marilyn Truman specifically testified that she was aware of two or three complaints regarding animal elopements, but that all such issues occurred before 2001 (*Id.* at 22-25). Moreover, these few calls were in the nature of someone looking for Defendant Daniel Truman (*Id.* at 24). She explained that she recalled the date because it was before her husband opened up the business Brakes by the Bay in 2001 (*Id.* at 25).

Robert Truman was only asked whether he was aware of the elopements after 2003 (Robert Truman dep, 51-52). He specifically testified that he was not aware of any of the elopements (*Id*). Plaintiff did not inquire whether he was aware of the two or three elopements indirectly brought to Marilyn Truman's attention at some time before 2001. Regardless, he was not aware of any post-2003 elopements. Thus, the undisputed evidence is that the Trumans were not aware—and were never made aware—of any animal elopements between (at least) 2003 and the incident in 2010.

Given these facts, it is abundantly clear that the Trumans had absolutely nothing to do with the animal elopements at issue. There is no evidence that either had knowledge of any animal elopements from 2003 to 2010. And there is absolutely no evidence that the Trumans exercised possession and control over the premises or the horse in question. In fact, this is not even a matter where the Trumans gave possession to Defendant Daniel Truman—instead, they simply took title ownership (under Plaintiff's theory) in exchange for lending Defendant Daniel Truman $15,000 in 1989. This is the same manner in which a lending institution would have a secured interest in a premises subject to a mortgage, but would cede possession to the mortgagor.

Defendant Daniel Truman has had uninterrupted possession and control of the property since at least 1989 (and obviously well before).

In light of these facts, it is not surprising that this Court has phrased the question presented as follows: "whether, and under what circumstances, a property owner who is not in possession of the property and does not participate in the conduct creating an alleged nuisance may be liable for the alleged nuisance." While Plaintiff's briefing has focused on title ownership, there is no dispute that the Trumans were not in possession or control of the property. In fact, as set forth in the Trumans' primary brief, none of the disinterested witnesses even knew that the Trumans had arguable title ownership in the property. Further, because the Trumans and Defendant Daniel Truman were estranged, the Trumans had not even been to the property in several years before the incident. Thus, this Court was correct in recognizing that the Trumans were certainly not in possession of the property.

Second, there is no dispute that the Trumans did "not participate in the conduct creating" the alleged nuisance. The Trumans did not create or incur responsibility for maintaining the fencing or other barriers on the property. The Trumans certainly did not assume any type of contractual responsibility to maintain the fencing or other barriers on the property. Moreover, although Defendant Daniel Truman apparently acquired various animals from time-to-time, none of these animals were acquired by the Trumans. There is no evidence that the Trumans even knew if and when Daniel Truman acquired an animal. There is absolutely no evidence that the Trumans knew that Daniel Truman acquired the horse that ultimately eloped from the property. Simply stated, other than passive title ownership, the Trumans had no nexus to the conduct that led to the alleged nuisance.

Otherwise, the Trumans simply defer to the statement of facts sections from their earlier briefing in this matter. As will be explained below, while this Court may endeavor to clarify nuisance law, any clarification of the law will result in a conclusion that the trial court properly granted the Trumans' motion for summary disposition. Consequently, in addition to clarifying the law, the Trumans respectfully request that this Honorable Court reverse the Michigan Court of Appeals and remand for reinstatement of the trial court's order summarily disposing of Plaintiff's nuisance cause of action.

ARGUMENT

I. THE GENERAL RULE IN MICHIGAN IS THAT A PROPERTY OWNER WHO IS NOT IN POSSESSION OF THE PROPERTY AND DOES NOT PARTICIPATE IN THE CONDUCT CREATING AN ALLEGED NUISANCE IS NOT LIABLE FOR AN ALLEGED NUISANCE, AND ANY ARGUABLE EXCEPTIONS SIMPLY DO NOT APPLY TO THE INSTANT MATTER

This Court directed the parties to file a supplemental brief focusing on the singular issue: "whether, and under what circumstances, a property owner who is not in possession of the property and does not participate in the conduct creating an alleged nuisance may be liable for the alleged nuisance." The general rule, in Michigan and elsewhere, is that such a property owner is not liable for a nuisance created by a tenant. While Defendants note that Michigan law has recognized exceptions for certain injuries taking place on leased property, the instant matter does not involve a lease, nor does it factually fit the exceptions. Accordingly, whether based on the general rule, or the inapplicability of the exceptions, the trial court properly granted the Trumans' motion for summary disposition and the Michigan Court of Appeals erred by reversing same. Consequently, this Court should (a) recognize the applicability of the general rule and perhaps clarify the exceptions that apply under Michigan law; and (b) reverse the Michigan Court of Appeals' opinion to the extent that it reversed the trial court's dismissal of Plaintiff's nuisance claim because no exception to the general rule factually applies to the instant matter.

A. INTRODUCTION

One interesting aspect of the instant matter is that it does not fit the traditional model of a landlord/tenant relationship. However, the landlord/tenant relationship is the most common fact pattern where the legal issues presented will arise and is, therefore, a good starting point for the analysis. The Trumans submit that the instant matter is far closer to a situation where a lender

holds title ownership to property incidental to a mortgage or loan. It bears repeating that Defendant Daniel Truman's possession and control of the property at issue has been uninterrupted for many, many years. However, as part of Defendant Daniel Truman's divorce, he was required to pay his ex-wife a cash sum, which the Trumans lent him in exchange for an ownership interest. Much like a lending institution does not take possession and control of property when lending money, the Trumans never took possession and control of the instant property. Defendant Daniel Truman's possession and control of the premises has been uninterrupted for decades.

Next, the Trumans note that the instant matter does not involve negligence. The trial court dismissed the negligence cause of action and this result was affirmed by the Michigan Court of Appeals. Although Plaintiff filed an application for leave to appeal in this Court (which was denied), Plaintiff did not challenge the dismissal of the negligence cause of action. Accordingly, the negligence cause of action is simply no longer at issue.

In researching this area of law, the Trumans note that this Court may be curious about MCL 554.139 establishing a legal duty to keep the premises in repair. Notably, this is not an argument that was actually raised by Plaintiff. Of course, the instant matter does not involve a lease, but instead involves circumstances closer to a land contract or security interest. Defendant Daniel Truman's ongoing use of the property may not have qualified to trigger MCL 554.139. But even if it did, MCL 554.139(1)(b) sets forth that a landlord's duty to a tenant does not extend to a "disrepair . . . has been caused by the tenants wilful or irresponsible conduct or lack of conduct." Here, Defendant Daniel Truman's conduct may have been "irresponsible." To whatever extent there was insufficient fencing or gating of the horse in question, Defendant Daniel Truman was certainly "irresponsible" in acquiring the horse and attempting to keep the

horse contained within that fencing. So, even if Plaintiffs had attempted to rely on MCL 554.139 to establish a negligence duty, MCL 554.139(1)(b) would have extinguished same.

Moreover, this Court very recently clarified that "control" is an essential part of determining the scope of a landlord's duty in negligence. *Bailey v Schaff,* __ Mich __; __ NW2d __ (Docket No. 144055. issued July 30, 2013), *10-12. In fact, in *Bailey*, this Court specifically recognized that "a landlord's duty does not extend to the areas within a tenant's leasehold, because the landlord has relinquished its control over that area to the tenant." *Id.* at * 12, n 36. The areas of control retained by the landlord will involve contractually designated areas or common areas. Here, while not a landlord-tenant relationship in the sense that there was a transfer of possession from the Trumans to Defendant Daniel Truman, there was no area of the property for which the Trumans retained control. The entire property has been under the exclusive, uninterrupted possession and control of Defendant Daniel Truman for many, many years. Thus, even if Plaintiff had tried to bolster the negligence cause of action, recent authority from this Court confirms that the negligence cause of action was simply untenable. Regardless, as noted above, the discussion of negligence is academic as the only issue in dispute at this stage of the litigation is the nuisance cause of action.

Finally, Defendants observe that nuisance law has evolved into a somewhat unpredictable cause of action that seems to apply when no other cause of action does. This is not merely Defendants' observation, as the Michigan Court of Appeals reached this conclusion long ago:

> There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a 'nuisance', and there is nothing more to be

> said. With this reluctance of the opinions to assign any particular meaning to the word, or to get to the bottom of it, there has been a rather astonishing lack of any full consideration of 'nuisance' on the part of legal writers. * * * A private nuisance is a civil wrong, based on a disturbance of rights in land. The remedy for it lies in the hands of the individual whose rights have been disturbed. A public or common nuisance, on the other hand, is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the obstruction of a highway to a public gaming-house or indecent exposure. As in the case of other crimes, the normal remedy is in the hands of the State. The two have almost nothing in common, except that each causes inconvenience to someone, and it would have been fortunate if they had been called from the beginning by different names. Add to this the fact that a public nuisance may also be a private one, when it interferes with the enjoyment of land, and that even apart from this there are circumstances in which a private individual may have a tort action for the public offense itself, and it is not difficult to explain the existing confusion. [*Williams v Primary School Dist*, 3 Mich App 468, 475-476; 142 NW2d 894 (1966).]

In the past several decades, the law of nuisance has not become significantly clearer—leading to disputes as in the instant matter. In fact, as set forth in the Trumans' primary brief, nuisance law evolved to state "ownership" alone as a basis for liability, even though none of those cases traces back to a factual circumstance where ownership alone was actually sufficient. It was an element without an origin. Thus, in 2013, there is still every reason for this Court to provide additional clarification for litigants and residents alike regarding the scope of nuisance liability.

B. THE GENERAL RULE IN MICHIGAN: NO LIABILITY FOR A PROPERTY OWNER IN THE ABSENCE OF POSSESSION AND CONTROL OF THE LAND OR NUISANCE AT ISSUE AND/OR THE CREATION OF SAME

Michigan law has long recognized that a landlord will not be responsible for a nuisance created by the actual possessor of the land. Although a line of Michigan Court of Appeals decisions suggested that mere ownership of property could lead to liability for a nuisance created by another, tracing that line of cases back leads to a dead-end. Ownership alone has never been sufficient to impose liability on a landlord for a nuisance. Therefore, these Michigan Court of

Appeals case are mere dicta. Instead, as this Court observed repeatedly in the latter part of the 19th century and early 20th century, and consistent with fundamental principles of fairness, Michigan law does not hold an owner responsible for a nuisance created by another. While there are limited exceptions that this Court may choose to validate, Plaintiff cannot satisfy these exceptions as to the Trumans. Accordingly, this Court's adoption of these exceptions would not prevent a conclusion that Plaintiff's nuisance cause of action is simply not tenable against the Trumans as a matter of fact and law.

In *Wagner v Regency Inn Corp*, 186 Mich App 158, 163-164; 463 NW2d 450 (1990) (emphasis supplied), citing 4 Restatement Torts, 2d, § 838, p 157, the Michigan Court of Appeals opined as follows:

> The **possessor** of land upon which the third person conducts an activity that causes a nuisance is subject to liability if: (1) he knows or has reason to know that the activity is being conducted and that it causes or involves an unreasonable risk of causing the nuisance, and (2) he consents to the activity or fails to exercise reasonable care to prevent the nuisance.

Thus, the *Wagner* panel recognized that there are circumstances where a nuisance created by another can lead to liability—but this liability is limited to the *possessor* of land. Indeed, in order to be liable for a public nuisance, a person "must have possession or control of the land." [2] *Id.* citing *Stevens v Drekich*, 178 Mich App 273, 278; 443 NW2d 401 (1989).[3] The Trumans note that the *Wagner* decision was issued on November 5, 1990, and was binding on the Michigan Court of Appeals pursuant to MCR 7.215(J)(1).

Here, there is no evidence that the Trumans were in possession of the real property at the time of the incident. In fact, Defendant Daniel Truman was in exclusive possession of the

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[3] In *Stevens*, the Michigan Court of Appeals recognized that a cause of action for nuisance is not tenable in the absence of "possession and control." Stevens, supra at 278.

property from before 1989 (when the Trumans lent him money to facilitate the divorce) to the date of the accident (and beyond). The Trumans only nexus to the property was lending money to Defendant Daniel Truman to "buy out" his ex-wife as part of the divorce. While this loan gave the Trumans title ownership to the property, the Trumans never possessed or controlled the property. Instead, Defendant Daniel Truman's possession and control has been entirely uninterrupted for decades.

Rather than following *Wagner*, Plaintiff urges a nuisance theory based solely on passive ownership, rather than possession and control (see Plaintiff's brief, 22). The evidence is uncontroverted on this issue. Robert Truman testified that he had not been to the premises in nearly a decade and he only drove by it twice in eight years (Robert Truman dep, 30, 35). Defendant Daniel Truman's recollection was that it was five or six years before the incident (Daniel Truman dep, 20). Robert Truman has spent no time with his brother over the past ten years (*Id.* at 45). He certainly did not get information or reports about Daniel Truman or the property (*Id.* at 51). Robert Truman never inspected the property, nor has he done anything to make sure Defendant Daniel Truman is properly managing the property because "it's [Daniel's] farm." (*Id.* at 52). Not only were the Trumans not the possessors of the land, it had been many years since they even visited the land. Regardless, under *Wagner*, which was binding on the Michigan Court of Appeals, the absence of possession and control precluded a nuisance claim against the Trumans.

The *Wagner* decision was nothing new for Michigan law. Although the instant matter is not a true landlord-tenant circumstance, a landlord-tenant relationship is the fact pattern most likely to lead to the creation of a nuisance by someone other than the owner of the property. Indeed, in most circumstances, a landlord will be divested of possession and control of the

property by virtue of a lease to a tenant. Thus, the Trumans posit that landlord-tenant law is the first place to look when determining the potential liability of a property owner for a nuisance created by another. And Michigan law has long recognized that a landlord is not responsible for a nuisance created by a tenant.

In *Maclam v Hallam*, 165 Mich 686; 131 NW 81 (1911), one of the landlord's tenants stacked crates that interfered with pedestrian traffic, and the plaintiff suffered injuries when tripped over one of the crates. *Id.* at 687. In lieu of suing the tenant, the plaintiff sued the landlord owner of the premises. *Id.* The trial court engaged in a lengthy exchange with the attorneys regarding the scope of responsibility for this public nuisance, before ultimately concluding that the defendant was entitled to a directed verdict. See generally *id.* On appeal, this Court agreed that Michigan law simply did not allow a plaintiff to sue a landlord for nuisance based on a condition created by the tenant. *Id.* at 693-694.

Of course, this principle goes back even further than 1911. In *Harris v Cohen,* 50 Mich 324; 15 NW 493 (1883), this Court considered the propriety of a directed verdict in a nuisance action against a landlord based on broken pipes leaking water from the leased premises onto the plaintiff's premises. This Court affirmed the directed verdict, observing that—even as of 1883—Michigan law had already recognized on prior occasions that a tenant is responsible for making repairs to the property to prevent a nuisance:

> There was no obligation averred or shown, making defendant responsible to her tenant for repairs, or in any way referring to repairs. In the absence of such a duty, the responsibility must usually rest on the tenant, and such has been our holding in *Fisher v Thirkell* 21 Mich 1 [1870] and *Clark v Babcock* 23 Mich 164. [1871] [*Id.* at 326.]

This Court unanimously agreed that the plaintiff's nuisance claim against the landlord was properly dismissed via directed verdict.

More recently, in *Szkodzinski v Griffin*, 171 Mich App 711; 431 NW2d 51 (1988) the Court of Appeals rejected the conclusion that the owner of real property can be held responsible for the actions of a tenant's dog. In that case, the Michigan Court of Appeals rejected many of the same arguments being raised by Plaintiff here—that a passive landlord cannot be liable for its tenant's dog where it "neither owns, keeps nor controls the dog." *Id.* at 714. While analyzed in the context of common law, statutory and ordinance dog bite liability, the Court of Appeals' opinion was grounded and focused on control of the animal and the premises. Absent control over either, the Court held that liability does not attach. Thus, Michigan law has long recognized that a property owner will not be held liable for a nuisance created by another (such as a tenant). Applying the general rule, the trial court correctly granted summary disposition to the Trumans.

C. THE COURT OF APPEALS' ERRONEOUS RELIANCE ON DICTA

Instead of following the *Wagner* decision, the Michigan Court of Appeals accepted Plaintiff's invitation to follow the later-issued *Cloverleaf Car Co v Wykstra Oil Co*, 213 Mich App 186; 540 NW2d 297 (1995)(COA Opinion, 5). In *Cloverleaf*, as part of a decision finding the defendant not liable for nuisance, the Michigan Court of Appeals opined as follows:

> A defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant owned or controlled the land from which the nuisance arose, or (3) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise. *Gelman Sciencess, Inc* v *Dow Chemical Co,* 202 Mich App 250, 252; 508 NW2d 142 (1993).

Although the *Cloverleaf* panel did not find liability, it did choose to recite the examples of nuisance listed in the *Gelman Sciences* decision it cited. This meant a quotation of the phrase "the defendant owned or controlled the land from which the nuisance arose." Importantly, the *Cloverleaf* decision did not involve holding an owner liable for a nuisance created by another on

the land. As such, any discussion of ownership alone leading to nuisance liability was mere dicta.[4] There was no such ruling.

The *Gelman Sciences* decision, in turn, borrowed its recitation of the examples of a nuisance from a 1982 Court of Appeals decision: "Generally, nuisance liability may be imposed where (1) the defendant has created the nuisance, (2) the defendant owned or controlled the property from which the nuisance arose, or (3) the defendant employed another to do work that he knew was likely to create a nuisance. *Radloff v Michigan*, 116 Mich App 745, 758; 323 NW2d 541 (1982)." *Gelman Sciences, supra* at 252. Of course, after reciting those examples, the *Gelman Sciences* panel immediately cited *Detroit Bd of Ed v Celotex (On Remand)*, 196 Mich App 694, 712; 493 NW2d 513 (1992), for the proposition that a commercial transaction requires "control of the nuisance at the time of injury." *Gelman Sciences*, *supra* at 252. Because the defendant did not own or possess the personal property that was the alleged nuisance, a nuisance claim was not available to the plaintiff. *Id.* Instead, the plaintiff was required to proceed under a product liability, negligence, or breach of warranty theory. *Id.* So, regardless of the recitation of elements, the *Gelman Sciences* decision does not support a conclusion that the owner of property can be deemed responsible for a nuisance created by a person in possession and control of the property. Alternatively, the recitation of elements was also dicta.

The *Celotex* decision is also instructive. In *Celotex*, the plaintiff similarly tried to argue that the creation of asbestos-containing products allowed for liability for nuisance (rather than merely product liability claims). *Celotex*, *supra* at 709-710. The Michigan Court of Appeals

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[4] "'Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication.'" See *Perry v Golling Chrysler Plymouth Jeep, Inc*, 477 Mich 62, 70 n 7; 729 NW2d 500 (2007), quoting Black's Law Dictionary (6th ed).

disagreed, noting that creation of a product does not give rise to nuisance liability because there is no control over the product. *Id.* The *Celotex* Court further recognized as follows:

> In lieu of a rule of general application, a functional test has been applied to determine whether the defendant "uses" property in a manner sufficient to subject him to liability for nuisance. A critical factor in this test is whether the defendant exercises control over the property that is the source of the nuisance. Thus, liability of a possessor of land is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harm to others. [*Id.* at 711 n 8, quoting 58 Am Jur 2d, Nuisances, § 123, p 764.]

In any event, the absence of control over the product in *Celotex* was among the reasons that liability was not imposed against the defendant for nuisance.

In addition, the treatise cited by the *Celotex* opinion also confirms that property ownership is not required to be liable for a nuisance; rather it was the *control* over the nuisance at the time it occurs:

> Property ownership is generally not a prerequisite to nuisance liability. Rather, the test of liability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise. For one to be held liable for a nuisance, the person must control or manage or otherwise have some relationship to the offensive instrumentality or behavior that would allow the law to say that the defendant must stop causing it and/or pay damages for it. Thus, dominion and control over the property causing the harm is sufficient to establish nuisance liability.
>
> Observation: A defendant must have control over the instrumentality causing the alleged nuisance at the time the damage occurs. [58 Am Jur 2d, Nuisances, § 91.]

So, again, *Celotex* and its authorities do not support mere ownership sufficing to establish liability for a nuisance.

Even the non-binding decisions of the Michigan Court of Appeals (i.e. the pre-November 1990 ruling) do not support liability against the Trumans. As noted above, *Cloverleaf* cited *Gelman Sciences. Gelman Sciences,* in turn, cited a pre-November 1990 decision, *Radloff.* In

Radloff, the Michigan Court of Appeals recited the examples of nuisance as allowing for liability based on "ownership or control" of the property. *Id.* at 758. However, in *Radloff*, the trial court concluded after a bench trial that the defendant both owned and controlled the property—a finding that, based on the evidence, was not clearly erroneous. *Id.* at 754, 759. In fact, the trial court concluded that the defendant was in "complete possession and control" of the area. *Id.* at 754. In addition, the *Radloff* decision distinguished the *Merritt* decision because the defendant did *more than merely own* the land at issue. *Id.* at 754-757. So, once again, *Radloff* does not support a conclusion that mere ownership of land, without also having possession and control of the land, can support a nuisance claim.

The *Radloff* Court's recitation of the examples of a nuisance claim cited *Stemen v Coffman*, 92 Mich App 595, 597-598; 285 NW2d 305 (1979). The basis of these elements arises from this language in *Stemen*:

> "Liability for damage caused by a nuisance turns upon whether the defendant was in control, either through ownership or otherwise." 58 Am Jur 2d, Nuisances, § 49, p 616. We have found no authority imposing liability for damage caused by a nuisance where the defendant has not either created the nuisance, owned or controlled the property from which the nuisance arose, or employed another to do work which he knows is likely to create a nuisance. The city's relationship with the property alleged to constitute a nuisance in this case falls under none of these headings; indeed, it is far more attenuated. To hold the city liable under the "nuisance exception" in this case would stretch the concept of liability for nuisance beyond all recognition. [*Id.* at 598.]

Unfortunately, the *Stemen* panel did not provide any case citations for the proposition that a nuisance can be based on ownership of the property alone.

And the treatise citation is no longer current. Instead, it has been replaced by the above-cited, 58 Am Jur 2d, Nuisances, § 91, which emphasizes "control" of the property. It is unclear whether the treatise provision cited by the *Stemen* panel included the same language. If so, the *Stemen* panel quoted the treatise accurately, but failed to follow the guiding principle of the

treatise provision—which is to emphasize that control of the property is essential to a finding of nuisance. Either way, the *Stemen* panel introduced a new principle into Michigan law—the idea of a defendant being "in control" of a nuisance by virtue of merely owning property—which did not previously exist.

Although the Michigan Court of Appeals could have followed *Stemen* and its progeny when deciding the *Wagner* matter on November 5, 1990, the *Wagner* panel did not do so. Instead, the *Wagner* decision recognized that a possessor of land may be liable for a nuisance that he or she creates. It is rather obvious that ownership and control of property *usually* run together. The purpose of having the elements read "owned or controlled," rather than "owned and controlled," is that ownership is not required for nuisance liability. Instead, as recognized by all of these decisions, as well as the treatises cited above, it is control over the land/nuisance that gives rise to potential liability.

If Michigan law is not clear that only the person in control of the property/nuisance may be held responsible for the nuisance, then Michigan law should be clarified to so hold. The person that is in possession or control of the property will often be the person that created the nuisance. But, even in the absence of creation, the person in possession or control of the property is in the best position to stop the nuisance. This is further consistent with this Court's recent clarification that a landlord only retains "control" over common areas. See *Bailey, supra.* Where, as here, Defendant Daniel Truman was in exclusive possession and control of the property, and was also the person that created the nuisance, the Trumans simply cannot be deemed responsible for the nuisance at issue.

In fact, the instant matter illustrates the potential absurdity of allowing mere ownership to serve as the basis for preventing a nuisance. Once the requirement of possession and control is

removed, the slippery slope leads to lending institutions and mortgagees being held liable for nuisances on mortgaged property. After all, much like a lending institution is not required to possess or control the property at the time it lends money regarding same, the Trumans did not possess or control the property. Instead, the Trumans performed a role equivalent to a home equity mortgage. They were, essentially, mortgagees that took title to the property pending repayment.

Of course, other jurisdictions have grappled with the issue of the degree to which a mortgagee may be sued in tort. Whether a mortgagee can or will be deemed responsible will turn on the issue of possession and control. See *Coleman v Hoffman,* 64 P3d 65 (Wash App, 2003), citing Restatement (Second) of Torts § 328E (1965). The Restatement defines possession as follows:

> (a) a person who is in occupation of the land with intent to control it or
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

In adopting this rule to determine possession, the *Coleman* Court recognized that it is not "title" that can support a tort action against a mortgagee; instead, the "critical point is the possession itself." *Coleman, supra* at 860. Thus, while the mortgagee in possession cases generally involve negligence, even this line of cases requires possession to lead to tort liability.

Michigan law has not had an opportunity to apply the mortgagee in possession principles. However, there is no reason to believe that Michigan law would recognize a "mortgagee in possession" theory in the absence of possession. If so, that would lead to mortgage liability. Every lending institution could be held liable based on passive title

ownership. The absurdity of such a principle is exactly why such a rule has not evolved in Michigan or elsewhere. The "mortgagee in possession" line of cases require possession.

Of course, as noted above repeatedly, the Trumans did not possess or control the land at issue. Instead, Defendant Daniel Truman possessed and controlled the land. He also owned, possessed and controlled the personal property—the horse—that was the true nuisance in this matter. It was certainly Defendant Daniel Truman's decision to acquire a horse 10 days before the incident and it was his responsibility to keep his horse on the land and out of the road. Whether based on the land or the horse, only Defendant Daniel Truman can be held liable for this nuisance. As such, the trial court properly granted the Trumans' motion for summary disposition.

D. IF THIS COURT RECOGNIZES AN EXCEPTION TO THE GENERAL RULE, IT SHOULD NOT BE BASED ON MERE OWNERSHIP

As noted above, the Michigan Court of Appeals released a series of opinions that erroneously suggested that ownership alone can lead to liability for a property owner. In the instant matter, the Court of Appeals erroneously relied on that line of cases. However, there may be actual exceptions to the general rule discussed above. In certain circumstances, a landlord may be liable based on a nuisance on the property: (a) hidden dangers; and (b) circumstances surrounding public admission to the property. Quite obviously, neither of these circumstances applies to the instant matter. Moreover, the instant matter is not a true landlord/tenant fact pattern anyway. Accordingly, while this Court's clarification of the law may want to emphasize that the exception is the only circumstance where a property owner may be held liable for a nuisance on the property in possession of another, the inapplicability of the exception in the instant matter confirms that this Court should reverse the Michigan Court of Appeals and remand

for reinstatement of the trial court's order granting the Trumans' motion for summary disposition.

Again, the general rule is that a property owner is not liable for a nuisance on property that is in the possession and control of another. However, in *McCurtis v Detroit Hilton*, 68 Mich App 253, 255-256; 242 NW2d 541 (1976), the Michigan Court of Appeals considered the limited circumstances where, notwithstanding the general rule, nuisance liability could be fairly imposed:

> Generally where a premises is leased to a tenant, the lease is considered as equivalent to a sale of the premises for the lease term. See Prosser, Torts (4th Ed), § 63, p 399; Harkrider, Tort Liability of a Landlord, 26 Mich L Rev 260, 383 (1928). The tenant is said to be the owner of the premises and as such is subject to all the responsibilities of one in possession, both to those who enter upon the land and those outside of its boundaries. Prosser, supra, 399. As a result, a landlord who gives up control, possession and use of the land does not have a duty to maintain the premises in a reasonably safe condition and is not liable to persons injured on the premises. *Whinnen v 231 Corp*, 49 Mich App 371, 375; 212 NW2d 297 (1973), 49 Am Jur 2d, Landlord And Tenant, § 780, pp 722-725. However, it has also been held that a landlord will be liable for the injuries incurred by another even though the landlord has given up complete control, possession and use of the premises where: (1) at the time the premises is transferred to the tenant a hidden dangerous condition exists, the landlord knows or should have known of the condition and fails to apprise the tenant of it, or (2) the premises is leased for a purpose involving public admission and the landlord fails to exercise reasonable care to inspect and repair the premises before possession is transferred. See generally *Bluemer v Saginaw Central Oil & Gas Service*, 356 Mich 399; 97 NW2d 90 (1959), *Samson v Saginaw Professional Building Inc.*, 393 Mich 393; 224 NW2d 843 (1975), Prosser, supra, 401-402, 403-405. In the above two situations, a party is allowed to recover from a landlord on a nuisance as opposed to negligence theory. *Bluemer v Saginaw Central Oil & Gas Co., supra*, Prosser, supra, 401-402. [*McCurtis, supra* at 255-256.]

Thus, the Michigan Court of Appeals recognized that the absence of "control, possession, and use" of the property will ordinarily preclude liability. The Court then recognized exceptional circumstances where a person injured on the premises *can* maintain a claim for nuisance against the landlord.

These exceptional circumstances are not applicable to the instant matter for numerous reasons. First, the instant matter does not involve a landlord/tenant relationship. Instead, Defendant Daniel Truman never lost possession of the premises, nor have the Trumans ever "given" Defendant Daniel Truman possession. The instant matter simply does not lend itself to a landlord/tenant analysis, with its definitive transfer of possession.

Second, the citation to the *Samson* decision is perplexing, as the case only involved an assertion of negligence. There was no discussion of nuisance. It is unclear why the *McCurtis* Court cited a negligence case in the context of a nuisance discussion.

Third, the instant matter does not involve an injury on the premises. The exception recognized in *McCurtis* involved an injury to a person on the premises—either because of a hidden danger or because of knowledge that the public would be admitted to the leased property. In contrast, the instant matter involves a nuisance causing damage outside the property—the horse on the road. Accordingly, the *McCurtis* exceptions are generally inapplicable.

Fourth, neither exception factually fits the instant matter anyway. Both exceptions involve conditions that exist at the time of transfer of the property. *McCurtis, supra.* Here, as noted above, there was no transfer of the property from the Trumans to Defendant Daniel Truman. Defendant Daniel Truman had uninterrupted possession and control of the property from well before the Trumans lent him money in 1989 to the 2010 date of the incident (and beyond). There is simply no conceivable way for Plaintiff to satisfy an exception based on a condition existing at the time of the transfer of property.

In addition, as it relates to a hidden danger, there simply was not one. To whatever extent Defendant Daniel Truman erroneously decided to acquire his new horse or keep it in an unsuitable location, this was Defendant Daniel Truman's fully informed decision. At the time he

acquired the horse in 2010, he had more than twenty years of uninterrupted possession and control of the property. He did not have to acquire the horse, nor did he have to keep the horse in the corral. Or he could have made sure that the corral was a suitable location for keeping the horse *before* acquiring it or keeping it there. Defendant Daniel Truman had possessed and controlled the property for decades before the incident—nobody knew the sufficiency of the property for keeping a horse better than him. Any "condition" on the property was created entirely by Defendant Daniel Truman. This is simply not a matter where an exception for transferring possession of the property with a nuisance in place could possibly apply.

As it relates to the second part of the exception, the premises certainly were not open for public admission. In the absence of a lease, there was certainly no lease "in contemplation of public admission" to the premises. Thus, the instant matter does not fit factually into the one recognized exception for a nuisance claim against a property owner not in possession.

If this Court is inclined to clarify nuisance law, Defendants propose the following elements:

> A defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant was in possession and control of the land from which the nuisance arose, (3) the defendant transferred possession and control of the land to another with a nuisance already in place; or (4) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise.

The exception in (2) would be revised to eliminate ownership alone as a potential for nuisance liability. However, by adding (3), this Court would allow for an owner to retain liability for a nuisance that existed at the time that possession and control of the property transferred from the owner to the new possessor.[5] This would generally incorporate the spirit of the exception recognized in *McCurtis.*

[5] Of course, this rule might lead to statute of limitation issues.

Of course, even if this Court were to modify the rule as set forth above, the Trumans would still be entitled to summary disposition. At no point did they transfer the property to Defendant Daniel Truman. They certainly did not transfer the property to him with a nuisance in place. Instead, the nuisance (if any) arose many years later and solely because of Defendant Daniel Truman. Therefore, even if this Court were to modify nuisance law, the Trumans would still be entitled to summary disposition. Consequently, whether based on the general rule or the absence of an applicable exception, the Trumans respectfully request that this Court ultimately reverse the Michigan Court of Appeals and remand for an order reinstating the trial court's decision granting summary disposition to the Trumans on the nuisance cause of action.

E. CONCLUSION

The general rule is that a property owner who is not in possession or control of the property and does not participate in the conduct creating an alleged nuisance may be liable for an alleged nuisance. While Defendants note that Michigan law has recognized limited exceptions, the instant matter does not involve a lease, nor does it factually fit the exception by virtue of a transfer of possession and control with a nuisance already in place. Michigan law has never recognized mere ownership as alone justifying the imposition of nuisance liability. Accordingly, whether based on the general rule, or the inapplicability of the exceptions, the trial court properly granted the Trumans' motion for summary disposition and the Michigan Court of Appeals erred by reversing same. Consequently, while the Trumans have proposed an alternative rule in Section (I)(D) above, any clarification by this Court should (a) recognize the applicability of the general rule and the absence of facts triggering an exception in this matter; and (b) reverse the

Michigan Court of Appeals' opinion to the extent that it reversed the trial court's dismissal of Plaintiff's nuisance claim.

II. OTHER JURISDICTIONS SIMILARLY RECOGNIZE THAT A PROPERTY OWNER IS NOT LIABLE FOR A NUISANCE CREATED BY ANOTHER WHO IS IN POSSESSION AND CONTROL OF THE PREMISES.

As part of its consideration of the law, the Trumans have surveyed the extra-jurisdictional law regarding nuisance. Once again, the logical starting place for analyzing the question presented by this Court was landlord/tenant law. And there are numerous cases from other jurisdictions recognizing that a landlord will not be held responsible for a nuisance created by a tenant and exclusively within the tenant's control. Unless the nuisance was an inevitable result of the use of the land (i.e. for the express purpose of the lease, there was no way to use the property in that manner without it constituting a nuisance), only the tenant bears responsibility for the nuisance. If the tenant could use the land without creating a nuisance, the tenant is solely responsible for the nuisance. The only other exception is for common areas for which the landlord retained possession and control. These potential exceptions certainly do not apply to the instant matter. Therefore, to the extent that this Court wants to adopt an extra-jurisdictional exception to the general rule of non-liability, it will not be outcome determinative in this case.

Some jurisdictions have been explicit in requiring "control" of a nuisance to lead to liability. For example, in *State v Tippetts-Abbett-McCarthy-Stratton*, 527 A2d 688, 692 (Conn 1987), the Connecticut Supreme Court observed that a landlord's nuisance liability is based on whether "the portion of the property on which the condition exists is in the landlord's control or the tenant's." In other words, where the nuisance arises out of a so-called "common area" of leased premises, the landlord may be responsible. However, where the nuisance arises out of an

area that was leased exclusively to the tenant, the tenant is responsible for a nuisance arising from same.

Similarly, in *Midland Oil Co v Thigpen*, 4 F2d 85, 91-92 (CA8, 1924)(emphasis added), the Eight Circuit Court of Appeals recognized as follows:

> In order to make the landlord liable to the owner or occupant of adjoining property for injuries caused by the improper use of the demised premises by his tenant, the nuisance causing such injuries must necessarily result from the reasonable, ordinary and expected use of them by the tenant, or from the purpose for which they were leased, and **if the use of the premises by the tenant may or may not become a nuisance according as the tenant exercises ordinary care, or uses the premises negligently, the tenant alone is liable.** The landlord will not be liable for injuries caused by the misuse of the premises by the tenant merely because there was a manifest possibility of their being used in such a way. 16 RCL p 1074, § 593; note, 92 Am St Rep 524; *Maenner v Carroll*, 46 Md 193; Wood on Landlord & Tenant (2d Ed) § 536; *Langabaugh et al v Anderson*, 68 Ohio St 131, 67 NE 286, 62 LRA 948; *Murray v McCormick et al* (Springfield Court of App, Mo) 232 SW 733; *Pennington v Klemanski*, 278 Pa 591, 123 A 491; *Meyers v Pepperell Mfg Co*, 122 Me 265, 119 A 625; *Rice v White et al* (Mo. Sup.) 239 SW 141; *Shellman et al. v Hershey et al*, 31 Cal App 641, 654, 161 P 132; *Baker v Allen*, 66 Ark 271, 50 SW 511, 74 Am St Rep 93; *Murray v Richards*, 1 Allen (83 Mass) 414; *Todd v Collins*, 6 NJ Law, 127; *Ferguson v Hubbell*, 26 Hun, 250; Edgar v Walker, 106 Ga 454, 32 SE 582; *Clifford v Atlantic Cotton Mills*, 146 Mass 47, 15 NE 84, 4 Am St Rep 279; *Gardner v Rhodes*, 114 Ga 929, 41 SE 63, 57 LRA 749; *Metropolitan Savings Bank v Manion*, 87 Md 68, 39 A 90.

As of 1924, there was broad national support for the principles that (a) a landlord is generally not responsible for a nuisance created by a tenant; and (b) a landlord will only be responsible for an nuisance created by the tenant where the tenant's creation of the nuisance was inevitable and the tenant could not have used the property to avoid creating a nuisance. Stated otherwise, if the tenant could have used the property in a manner to not create a nuisance, then the tenant bears sole responsibility for creating the nuisance. In other words, a mere *possibility* of a nuisance arising from the tenant's use is insufficient.

Here, of course, Defendant Daniel Truman could certainly have used the property without creating a nuisance. Had he simply not acquired the horse in question, the nuisance at issue in this case would not have occurred. Alternatively, had he simply taken greater care to keep his horse corralled, then the nuisance would not have occurred. There was nothing about Defendant Daniel Truman's farming operations that necessarily led to the creation of a nuisance. Instead, it was the means and methods employed by Defendant Daniel Truman that led to the alleged nuisance. Thus, even if this Court were to adopt the exception set forth above, it would not be outcome determinative in this case.

Another subset of this rule is one where the landlord is deemed responsible for nuisances that were in existence on the premises before the property was leased to the tenant, but not where the nuisance originates after the tenant takes possession. For example, in *Chandler v Massa*, 415 F2d 560 (CA6, 1969), the Sixth Circuit observed the following rule from Tennessee:

> In Tennessee, a landlord is liable to his tenant and to invitees of the tenant for injuries resulting from a dangerous condition of the leased premises which existed at the time of the lease, if the landlord knew or in the exercise of ordinary care should have known thereof. The landlord, however, is not liable for a dangerous condition which originates during the tenancy when the landlord is out of possession of the premises.

So, again, this particular rule recognizes that nuisances created by the tenant during a lease are simply not the responsibility of the landlord.

Here, of course, Defendant Daniel Truman did not lease the premises from Defendants. Moreover, there was no transfer of possession from Defendants to Defendant Daniel Truman. Thus, Plaintiff could never establish that there was a pre-existing nuisance that Defendants transferred to Defendant Daniel Truman. Instead, the facts of this matter establish that Defendant Daniel Truman is solely responsible for the creation of any nuisance. It was his decision to acquire the horse without ensuring that there was a suitably sufficient enclosure for it.

As this condition arose during Defendant Daniel Truman's sole and exclusive possession of the property, this Court's adoption of this second, slightly difference exception to the general rule would also not be outcome determinative.

Finally, additional guidance can be found in the extra-jurisdictional cases involving animal elopement. In *Edwards v Chadwick,* 321 A2d 792 (Md App, 1974), the Maryland Court of Appeals considered the potential nuisance liability of a property owner based on a horse eloping from property leased to another and leading to a collision with the plaintiffs' automobile. The defendants in *Edwards* were the owner of the property (Chadwick) and the tenant (Schuster). The purpose of the lease was to operate a "dude ranch." There were prior incidents of horses escaping from the property.

The *Edwards* Court was presented with the issue of whether Maryland law recognized summarized Maryland law as follows:

> Over a century ago the Court of Appeals set out the basic principle evolved from numerous adjudications: "That where property is demised, and at the time of the demise it is not a nuisance, and becomes so only by the act of the tenant while in his possession, and injury happen during such possession, the owner is not liable." *Owings v Jones*, 9 Md. 117-118. 9 The principle was affirmed in *Sherwood Brothers, Inc v Eckard*, 204 Md 485, 494, 10 in quoting with approval *Swords v Edgar*, 59 N.Y. 28: "A lessor of premises, not per se a nuisance, but which becomes so only by the manner in which they are used by the lessee, is not liable therefor . . . ." A defective fencing here was not a nuisance. "A nuisance exists because of a violation of an absolute duty so that it does not rest on the degree of care used but rather on the degree of danger existing with the best of care." *Sherwood*, at 493. As with the lift in *Sherwood*, the defective fencing here was not dangerous or potentially dangerous unless it was negligently used. The real danger in the defective fencing was not its disrepair, but, rather the manner of its use by the tenant. This cannot constitute a basis for holding the landlord liable. The answer to the question presented by Brenda and Charles is no, the trial court did not err in submitting the case to the jury on the test for liability of Chadwick for activities of Schuster on the leased premises after the leasing as stated in § 379A, rather than for a dangerous condition of the premises existing at the time of the lease as stated in § 379.

> The answer to the question presented by Chadwick is yes, the trial court was correct, under the facts presented, "in the framing of its issues and instructions to the jury so as to indicate that the landlord would be liable only if he knew or had reason to know, at the time of the leasing to Schuster, that the intended use of the farm by the tenant would unavoidably involve an unreasonable risk of harm to users of the highway." We think it correctly reflects the Maryland law.

Thus, the Maryland Court of Appeals recognized that Maryland law only allows for liability if the landlord knew, at the time of the lease, that an unreasonable risk of harm to highway users was inevitable based on the lease. Quite obviously, even if the fencing in *Edwards* was defective, it was not dangerous until the tenant (Schuster) made the decision to board horses within the fencing. Accordingly, the Court ruled that the owner of property could not be held liable for any alleged nuisance arising from a horse eloping.

Here, of course, there was no lease of the premises. This prevents a conclusion that the Trumans somehow would have or could have known at the inception of the lease that Defendant Daniel Truman would inevitably be creating a nuisance with a horse subsequently purchased. In fact, the horse was not acquired until 10 days before the incident. There is no evidence that the Trumans: (a) knew that Defendant Daniel Truman had acquired the horse in question; or (b) knew that Defendant Daniel Truman would be keeping the horse in the corral (which Plaintiff alleges was insufficient to keep the horse from leaving the property) rather than ensuring the corral was sufficient or placing the horse elsewhere. Of course, yet another option was Defendant Daniel Truman simply not acquiring the horse until a sufficiently suitable enclosure was in place. In any event, given the absence of liability in *Edwards* under much more egregious facts, adoption of the rule of law from Maryland would preclude Plaintiff from advancing a nuisance claim against Defendants.

At the other extreme is *Bowen v Holloway*, 255 So2d 696 (Fla App 1971), where the Florida Court of Appeals concluded that the facts did not justify summary disposition in favor of

the "landlord." In *Bowen*, the property owner leased pasture and horse stalls to multiple horse owners. While the pasture area was completely enclosed, the stall area was not. *Id.* at 697. A horse escaped from one of the stalls due to a broken door latch. Because the stall area was not fully enclosed, the horse wandered onto a highway resulting in a collision with the plaintiff's motorcycle. The owner of the property was aware that horses had previously escaped.

Based on the totality of these facts, the *Bowen* Court concluded that summary judgment was not appropriate because of an incipient nuisance. *Id.* at 698. The Court concluded that leasing stall space for the express purpose of housing horses, without having the stall space encircled by fencing, was a condition existing before the lease in question was created. Therefore, the condition was a potential incipient nuisance. Of course, the *Bowen* Court simply could have concluded that the stall area was a "common area" required to be maintained by the landlord, rather than the several individual tenants. In any event, it presents a unique and extreme fact pattern in which a landlord could fairly be held responsible. Interestingly, despite concluding that summary judgment was inappropriate, the *Bowen* Court questioned whether the alleged nuisance would be a proximate cause, given that the tenant—rather than the landlord—decided to keep the horse in the stall on the night in question. *Id.*

The facts of the instant matter are certainly quite distinguishable from *Bowen*. First, the *Bowen* matter involved an express lease of the premises. The instant matter does not involve a lease of premises, but a change of title ownership during Defendant Daniel Truman's uninterrupted possession and control of the premises. Second, the *Bowen* matter involved a lease to multiple tenants, with the owner retaining possession and control of the entirety of the premises. Indeed, a later Florida Court of Appeals matter distinguished *Bowen* by observing as follows: "In that case [Bowen], there was no question that the landowner was active in operating

the facilities . . . in *Bowen*, the landowner was also in control of the premises." *Florida Power & Light Co v Morris*, 944 So2d 407; 414 (Fla App, 2006). The *Florida Power & Light*, the Court reversed a judgment against a property owner.[6] *Id.* The fact that the property owners in Bowen remained in possession and control of the premises necessarily distinguishes the Bowen matter from the question presented posed by this Court when granting leave. Indeed, like *Florida Power & Light* and unlike *Bowen*, the Trumans did not have possession and control of the premises. In fact, the Trumans never had possession and control of the premises.

Third, the *Bowen* matter involved fencing that was a "common area," and not leased to any specific person for their exclusive possession and control. The instant matter does not involve a "common area"; instead, Defendant Daniel Truman was in exclusive possession and control of the entire property. There was no area where the Trumans retained possession and control. Again, they never had any possession and control.

Fourth, the *Bowen* matter involved a lease for specific purpose of keeping horses on the property. In fact, the property was leased for the purposes of keeping horses, despite the fact the stall area was not fully fenced in at the time of the lease. In contrast, the instant matter involved possession and control of an entire farm without a specific lease purpose (or even a lease, for that matter). Accordingly, there are numerous reasons why the *Bowen* matter offered facts that fit

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[6] The Oklahoma Supreme Court also distinguished *Bowen*, noting that "the uncontroverted evidence shows that a nuisance, if one existed, had its inception after the premises were leased, when a tenant constructed the fences used to enclose the horses." *Hoyle v Glenn E. Breeding Co*, 555 P2d 1278, 1283 (Okla 1976). Indeed, although the *Hoyle* property owner knew that the tenant planned to have horses, the property owner also imposed an obligation on the tenant to erect suitable fencing before doing so. Here, as in *Bowen*, there was no nuisance at the time that Defendants acquired title ownership to the property. So even if there has been a transfer of possession and control (which there was not), there was no incipient nuisance. As in *Hoyle*, this Court should find *Bowen* factually distinguishable.

into the other exceptions to the rule of non-liability, whereas the instant matter is materially distinguishable from *Bowen*.[7]

In summary, the extra-jurisdictional cases recognize a general rule similar to that of Michigan—an owner of property is generally not liable for a nuisance created by another. Where a nuisance is transferred from a landlord to a tenant, or whether the nuisance will necessarily and inevitably arise out of the express purposes for the lease of the premises, the landlord may retain liability for a nuisance. Of course, neither exception is applicable to the instant matter, where: (a) there was no lease; Defendant Daniel Truman has had many years of uninterrupted possession and control of the property; and (b) the nuisance was avoidable through the exercise of additional care by Defendant Daniel Truman. Therefore, even if this Court were to adopt one or more of the extra-jurisdictional exceptions, it would not be outcome determinative.

CONCLUSION AND REQUEST FOR RELIEF

This Court directed the parties to file a supplemental brief focusing on the singular issue: "whether, and under what circumstances, a property owner who is not in possession of the property and does not participate in the conduct creating an alleged nuisance may be liable for the alleged nuisance." Defendants observe that the circumstances where a property owner may be liable for such a nuisance are extremely limited. If this Court is inclined to clarify nuisance law, Defendants propose the following elements:

> A defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant was in possession and control of the land from which the

[7] In addition, the owners in *Bowen* acknowledged knowledge of horses escaping on prior occasions. In the instant matter, the evidence established that Defendants did not have knowledge of any animal escapes in the several years preceding the incident.

> nuisance arose, (3) the defendant transferred possession and control of the land to another with a nuisance already in place; or (4) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise.

The exception in (2) would be revised to eliminate ownership alone as a potential for nuisance liability. However, by adding (3), this Court would allow for an owner to retain liability for a nuisance that existed at the time that possession and control of the property transferred from the owner to the new possessor. This would generally incorporate the spirit of the exception recognized in McCurtis. Of course, even if this Court were to modify the rule as set forth above, the Trumans would still be entitled to summary disposition. Consequently, whether based on the general rule or the absence of an applicable exception, the Trumans respectfully request that this Court reverse the Michigan Court of Appeals and remand for an order reinstating the trial court's decision granting summary disposition to the Trumans on the nuisance cause of action.

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